A

CCKY v. CCT

HIGH COURT MALAYA, KUALA LUMPUR
FAIZAH JAMALUDIN J
[ORIGINATING SUMMONS NO: WA-24F-79-03-2018]
23 JUNE 2020

B

FAMILY LAW: *Children – Guardianship – Application by mother for sole guardianship – Primary considerations in deciding guardianship of child – Whether in welfare and best interest of child for mother to be sole guardian of child*

C ***FAMILY LAW:*** *Children – Custody – Application by mother for sole custody of child – Primary considerations in custody of child – Amount of access ought to be granted to father – Whether free access – Whether in best interest of child for father to have free unscheduled and unsupervised access to child – Law Reform (Marriage and Divorce) Act 1976, s. 96*

D ***FAMILY LAW:*** *Maintenance – Maintenance for child – Factors considered in deciding maintenance payable for child – Parents' statutory obligation to maintain child – Father's means and needs of child – Lifestyle and station of life of parties during marriage – Whether father solely responsible for child's maintenance – Whether mother working – Sum of maintenance and arrears payable – Law Reform (Marriage and Divorce) Act 1976, ss. 77, 78, 92 & 93*

E

FAMILY LAW: *Maintenance – Spousal maintenance – Claim by wife – Factors considered in deciding maintenance for wife – Husband's statutory obligation to pay maintenance to wife – Whether wife working and had own income – Duration of marriage – Law Reform (Marriage and Divorce) Act 1976*

F

FAMILY LAW: *Family violence – Restraining order – Application for – Allegations of domestic violence – Wife verbally and physically abused by husband – Application for restraining order against husband from assaulting, molesting, harassing, threatening and/or otherwise forcing his society upon or interfering with wife, wife's family and/or child – Whether allegations of domestic violence proven* G *– Whether restraining order and/or injunction ought to be granted*

The parties, husband ('defendant') and wife ('plaintiff'), were married in 2016 and blessed with a child. According to the plaintiff, it was only after the marriage that she discovered that the defendant had a propensity for violence. Arguments, threats, physical attacks and verbal abuses finally H propelled the plaintiff to flea with the child. In the present application, the plaintiff sought (i) sole guardianship, custody, care of the child with reasonable access given to the defendant; (ii) child maintenance in the sum of RM8,700 per month until August 2018 and the sum of RM11,200 per month after August 2018, with an annual increase of 5% per year effective I on 1 January of every year, until the child completes his first degree; (iii) the child's educational, medical, dental and optical expenses and insurance

policies purchased in the child's name until maturity; (iv) spousal maintenance in the sum of RM4,500 per month with an annual increase of 5% per year effective on 1 January of every year; (v) interest of 5% per annum on sums due and owing by him under the order of this court; (vi) for the defendant to return the sum of RM16,620 to her; and (vii) a restraining order against the defendant, until further order, from assaulting, molesting, harassing, threatening and/or otherwise forcing his society upon or interfering with the plaintiff, her family and/or the child.

In support of her application, the plaintiff submitted that, *inter alia*, (i) the defendant, by his conduct and attitude, had shown that he did not prioritise the welfare of the child; (ii) the plaintiff had been the child's primary caregiver since his birth; (iii) the defendant enjoyed a decadent and self-indulgent lifestyle paid through his family business which included running various lottery and jackpot outlets. The defendant's father regularly wrote cheques for the defendant and gave the defendant free use of his own and the parties' expenses. The defendant also held directorships and was involved in various family-owned companies; (iv) their lifestyle, as exhibited in photographs, receipts and screenshots, included frequent travel overseas, dining out at expensive restaurants, wearing designer clothes, purchases of designer items for themselves and for the child; (v) the defendant was quick to resort to violence whenever he did not get his way and the verbal and physical abuses inflicted upon her were the cause of the breakdown of their marriage. He would swear and hurl insults at the plaintiff. His abusive ways included pushing her head to the ground, hitting her head, slapping her face, spitting on her and sitting on her. On one occasion, when they fought in the car, the plaintiff wanted to run away but was dragged from the carpark into the house; and (vi) the sum of RM16,620 claimed from the defendant was the balance of *angpao* monies totalling RM34,620 received by her parents during the parties' wedding reception. When the plaintiff went to their matrimonial home to pack, the defendant told her that there was only RM22,000 left of her *angpao* monies and that he would return the said sum. The defendant had since claimed that he banked-in RM20,000 only and as the plaintiff had engaged a photographer costing RM2,000 to take newborn photos of the child, he only returned RM18,000 to her. According to the plaintiff, the defendant ought to repay her a further RM16,620 as the total amount she had handed him was RM34,620.

The defendant's prayed for free and reasonable access of the child, including overnight access and additional access on the following occasions: (i) the child's birthday, for four hours, from 11am to 3pm or from 7pm to 10pm; (ii) the defendant's birthday on 14 July, from 11am to 5pm; and (iii) on Chinese New Year ('CNY'), every alternate year, where for the year that the plaintiff is celebrating with the child, the defendant to be given access to the child from 11am, on the second day of CNY to 5pm on the third day of CNY. The defendant (i) denied the plaintiff's claim he did not prioritise the

welfare of the child; (ii) claimed that the receipts exhibited by the plaintiff were unreasonable; (iii) despite admitting that he held directorships and was involved in the family business, he only received a salary totalling to RM6,110 and, at the same time, he was also bearing the costs of his mother's medical treatments where he had to bring his mother, who was in Teluk Intan, to a hospital in Kuala Lumpur; (iv) denied the plaintiff's averments on his lifestyle; (v) agreed to pay child maintenance but did not agree to pay for spousal maintenance for the plaintiff as she was working and had her own income; (vi) the plaintiff failed to provide evidence, *ie*, police reports, medical reports or photos, to show that he was a violent person; and (vii) argued that, regarding the *angpao* monies, the plaintiff had given him the sum of RM20,000 to keep in the safe and he had done so without checking or knowing whether the sum was actually RM20,000.

Held (ordering accordingly):

(1) In deciding on the issue of the child's guardianship, although the wishes of the child's parents were considered, the primary consideration was the welfare of the child. It was not in the welfare of the child for the plaintiff to be the sole guardian of the child. It would also not be in the best interest for the defendant to be cut-off from the responsibility of supporting the child and for providing for his health and education. Both the child's parents, the plaintiff and the defendant, were his guardians and were accordingly statutorily responsible for his support, health and education. Accordingly, both the plaintiff and the defendant were granted joint guardianship of the child. (paras 22, 26, 27, 28 & 90)

(2) The plaintiff was granted sole custody, care and control of the child. The child, at the time of the hearing, was one year of age. Being such a young infant, the child needed consistency in his life; in the persons he is with, in his schedule and in his surroundings and environment. It would not be in the child's best interest for the defendant to have free unscheduled unsupervised access to the child. The weekly day and time of such access by the defendant must be consistent and the access must be supervised by someone who has consistent presence in the child's life. During the child's infancy, it would also not be in his best interest and welfare for the defendant to have overnight access. Taking into account the child's best interest and welfare, the plaintiff's and defendant's wishes and the facts and circumstances of this case, the defendant was granted the right of access to the child on the following days and time: (i) on the first and third Saturdays of every month from 2pm to 6pm at a public place agreed between the parties, supervised by the plaintiff or her nominee; (ii) two weekdays per month to be agreed by the parties to be supervised by the plaintiff or her nominee; (iii) on the child's birthday for four hours to be agreed between the parties subject to the same terms of supervision; (iv) on the defendant's birthday on 14 July of every year for four hours to be agreed between the parties subject to

the same terms of supervision; and (v) on CNY, for alternate years starting from 2020, for the eve of CNY and first day of CNY to be exercised in Kuala Lumpur from 12pm to 8pm on both days. Once the child is older, the defendant may apply to the High Court under s. 96 of the Law Reform (Marriage and Divorce) Act 1976 ('LRA') to vary the order for the custody and/or the accompanying terms of access. (paras 32-34 & 90)

(3) Although the defendant argued that the receipts exhibited by the plaintiff were unreasonable, he did not exhibit any of his credit card statements nor any evidence to the contrary as to what was reasonable. Further, the defendant did not provide any evidence to support his claim that he was bearing the costs of his mother's medical treatments and the costs incurred per month for his travels to and from Teluk Intan. The defendant was under an obligation, under the LRA and the Divorce and Matrimonial Proceedings Rules 1980, to disclose all his means. However, he only disclosed the salary that he received as director of both the family companies as his means. It was inherently improbable that the defendant, who claimed to live only on a net monthly salary of RM6,110 per month, could afford, just from that salary, to, *inter alia*, pay mortgage or rental of a condominium in Damansara Heights, where the matrimonial home was, as well as the monthly charges and bills, pay for both his parents medical treatments, travel to four countries within the space of a month (where he stayed at high-end hotels), dine at expensive restaurants and wear designer clothes. Based on the defendant's lifestyle and the fact that he was the only son of a family, whose business was lottery and jackpot outlets managed by the defendant, his claim that his only means was the net salary of RM6,110 per month was inherently improbable. The plaintiff had discharged her burden of proving, on a balance of probabilities, of the defendant's lifestyle and means, through copies of receipts and screenshots of photographs on the defendant's own Facebook account. (paras 41, 47, 57, 59, 60 & 61)

(4) In computing the interim maintenance payable for the child and payable to the plaintiff, the court took into account (i) the means of the defendant; (ii) the lifestyle and station of life of the parties during the marriage; (iii) a father's primary obligation under the law to maintain his child; (iv) the fact that the plaintiff was working and holding a management position in a bank; (v) the needs of the plaintiff and the child; and (vi) the short duration of the marriage prior to their separation. The husband was ordered to pay (i) child maintenance in the sum of RM5,300 per month from 1 April 2018 and the sum is payable in advance before the seventh day of each month directly into a bank account designated by the plaintiff; (ii) the arrears of the child's

maintenance on or before 31 October 2019; (iii) the child's education expenses on school fees at a private or international school commencing from 1 January 2020; (iv) the existing insurance policies taken out for the child until maturity; (v) the sum of RM2,000 as maintenance for the plaintiff, payable from the month of August and is payable in advance by the seventh day of every calendar month, directly into a bank account designated by the plaintiff; (vi) interest at the rate of 5% per annum for (a) any arrears on the child maintenance in item (iii) above from 1 November 2019 until full realisation; and (b) on all future order of maintenance from the eighth day of each calendar month on which the same falls due until full realisation; and (vii) costs of RM5,000, to the plaintiff, within 30 days of this order. (paras 65, 71 & 90)

(5) The defendant, either by himself or by his agents, was restrained until further order, from assaulting, harassing and/or threatening the plaintiff. An injunction against molestation should also be granted against the defendant during the pendency of this matrimonial proceedings. (paras 80, 81 & 90)

(6) Faced with conflicting evidence as to how much *angpao* money was given by the plaintiff to the defendant to keep in the safe, the court was unable to decide on the truth as to the amount of money given to the defendant by the plaintiff for safe-keeping without cross- examination of the plaintiff and the defendant and the testimony of other witnesses, *ie*, her parents, as to the amount of money received during the wedding reception. The court was unable to decide on the plaintiff's prayer that the defendant return the sum of RM16,620 to her. (paras 88 & 89)

Case(s) referred to:

Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC ***(refd)***

Diana Clarice Chan Chiing Hwa v. Tiong Chiong Hoo [2002] 1 CLJ 721 CA ***(refd)***

Eng Mee Yong & Ors v. Letchumanan [1979] 1 LNS 18 PC ***(refd)***

Gan Koo Kea v. Gan Shiow Lih [2003] 4 CLJ 539 HC ***(refd)***

Karupayee Paramasua v. Ravisanthiran P Marimuthu [2011] 1 LNS 650 HC ***(refd)***

Koay Cheng Eng v. Linda Herawati Santoso [2008] 4 CLJ 105 CA ***(refd)***

Lee Soh Choo v. Tan Ket Huat [1986] 2 CLJ 143; [1986] CLJ (Rep) 440 HC ***(refd)***

Ng Say Chuan v. Lim Szu Ling [2010] 10 CLJ 371 HC ***(refd)***

Puncak Niaga (M) Sdn Bhd v. NZ Wheels Sdn Bhd [2011] 9 CLJ 833 CA ***(refd)***

Re Borthwick (Deceased); Borthwick and Another v. Beauvais and Others [1949] 1 Ch 395 ***(refd)***

Sheng Lien v. Tan Teng Heng & Anor [2010] 1 LNS 1480 HC ***(refd)***

Sivajothi K Suppiah v. Kunathasan Chelliah [2000] 3 CLJ 175 HC ***(refd)***

Tan Siew Kee v. Chua Ah Boey [1987] 1 LNS 77 ***(refd)***

Tay Bok Choon v. Tahansan Sdn Bhd [1987] 1 CLJ 441; [1987] CLJ (Rep) 24 PC ***(refd)***

Teh Eng Kim v. Yew Peng Siong [1977] 1 LNS 138 FC ***(refd)***

Teoh Hock Soon v. Chan Peng Yee [2012] 2 CLJ 960 HC ***(refd)***

Legislation referred to:
Guardianship of Infants Act 1961, ss. 3, 5, 11
Law Reform (Marriage and Divorce) Act 1976, ss. 77, 78, 89(1), 88(3), 92, 93, 96, 103
Rules of the High Court 1980, O. 14

For the plaintiff - YN Foo & Kiran Dhaliwal; M/s YN Foo & Partners
For the defendant - Albert Koo & YM Poh; M/s Chin & Rakan-Rakan

Reported by Najib Tamby

JUDGMENT
(encl. 1)

Faizah Jamaludin J:

Introduction

[1] This is an application by the plaintiff wife, CCKY, for the following:

(i) sole guardianship, custody, care of the child of the marriage, O, with reasonable access to O be given to the defendant husband;

(ii) for child maintenance in the sum of RM8,700 per month until August 2018 and the sum of RM11,200 per month after August 2018, with an annual increase of 5% per year effective on 1 January of every year, until the child completes his first degree;

(iii) for the child's educational, medical, dental and optical expenses and insurance policies purchased in the child's name until maturity;

(iv) for spousal maintenance in the sum of RM4,500 per month, with an annual increase of 5% per year effective on 1 January of every year;

(v) interest of 5% per annum on sums due and owing by him under the order of this court;

(vi) for the defendant husband to return the sum of RM16,620 to her; and

(vii) that the defendant husband be restrained until further order from assaulting, molesting, harassing, threatening and/or otherwise forcing his society upon or interfering with the plaintiff, her family and/or the child.

[2] After reading the plaintiff's and the defendant's affidavits and hearing the submissions of counsels, I made the orders detailed in section "Decision" of this judgment.

[3] The full grounds for my decision and for the orders made in respect of the plaintiff's application is set out in this judgment.

A **Background Facts**

[4] The parties were married on 8 January 2016. The child of the marriage was born on 18 September 2017.

[5] The plaintiff wife contends that it was only after the marriage that she
B found that the defendant husband has a propensity for violence. She says that during an argument on 23 October 2017 that took place in a car at the defendant's parents' house in Teluk Intan, the defendant "exploded in unreasonable rage" and pushed her face and slapped her. The defendant denies having attacked her; he challenges the plaintiff as regards the incident
C and puts her to strict proof.

[6] The plaintiff avers that on 25 October 2017 at around 11pm whilst they were staying at the defendant's parents' house in Teluk Intan, Perak, the plaintiff and the defendant had another argument, where the defendant threw her luggage bag outside the door and stepped on the bag twice causing it to
D break. The plaintiff says that during the same argument the defendant called her "bitch", pushed her roughly, slapped her and spat on her twice while she was holding the child in her arms. He threatened to smash her head if she dropped the child after she refused to pass the child to his sister. She says that she refused to hand the child over because she was afraid that the
E defendant would abuse her further. He then asked her at 1.30am to call her parents who were then in Melaka. The plaintiff says that upon hearing the physical abuse and verbal insults that the defendant had inflicted on her, her parents and younger brother drove 4.5 hours to Teluk Intan from Melaka. The defendant's mother told the plaintiff's parents that his violence was only "in the spur of the moment". The plaintiff and the child left Teluk Intan with
F her parents and her younger brother for their house in Seremban on the morning of 26 October 2017. The defendant denies the plaintiff's averments of the events that took place in Teluk Intan; he challenges her as to the whole incident and puts her to strict proof.

G **[7]** The plaintiff says that on 27 October 2019, the defendant called the plaintiff to ask her to return to their Damansara Villa condominium in Kuala Lumpur. However, he told her that her parents are no longer welcomed in his house and that he never wants to see them again. The plaintiff says that she told him that she could never return on such conditions and after that the defendant did not allow her back to the Damansara Villa condominium
H except to pack her things in his presence.

[8] The plaintiff says that she went over once to the condominium on 4 November 2017 to pack some of her things but could not take everything with her in one go. On 9 December 2017, she contacted the defendant to pick
I the rest of her things and the child's cot. She says that although the defendant said that he would let her know when she could go into the apartment, she heard nothing more from him. She called the defendant again and he told her that he would pack her things and leave it outside the front door. As

arranged, she went on 23 December 2017 to the condominium and found that the defendant had thrown all her things into plastic bags and garbage bags and left them together with the child's baby cot outside the door.

[9] The defendant denies that he had thrown the plaintiff's things as she claims. The defendant challenges the photos of the plaintiff's things in black garbage bags shown in exh. "CC-8" of her affidavit and puts her to strict proof. He claims that the things were arranged and shown as cruelty that had occurred to the plaintiff's person (kezaliman yang berlaku kepada diri pihak plaintif). The plaintiff denies that she had fabricated the arrangement in the photographs – she says that his accusation that she had done so was shocking. She averred in her affidavit-in-reply that the security guard on duty and their neighbour were present and that the defendant had changed the password on the front door so that she could not enter the house.

[10] After that date, the plaintiff and child never returned to the matrimonial home. On 21 February 2018, she referred the matrimonial difficulties to the reconciliation tribunal.

Issues For Determination

[11] There are four issues for the court's determination, which are:

(i) guardianship, custody care and control of the child;

(ii) maintenance for the child;

(iii) maintenance for the wife; and

(iv) restraining order against the husband.

(i) Guardianship, Custody, Care And Control

[12] This court is empowered to make orders of guardianship and custody of children. In deciding who should have guardianship of a child and in whose custody a child should be placed, the paramount consideration of this court is the welfare of the child. This is evident from the provision of s. 88 of the Law Reform (Marriage and Divorce) Act 1976 ("LRA") and s. 11 of the Guardianship of Infants Act 1961 ("GIA").

[13] Section 88 of the LRA empowers this court to make an order of custody in respect of children. There is a rebuttable presumption under s. 88(3) of the LRA that it is for the good of a child below the age of seven years to be with his or her mother. Section 88 of the LRA states:

> 88. Power for court to make order for custody
>
> (1) **The court may at any time by order place a child in the custody of his or her father or his or her mother** or, where there are exceptional circumstances making it undesirable that the child be entrusted to either parent, of any other relative of the child or of any association the objects of which include child welfare or to any other suitable person.

A (2) **In deciding in whose custody a child should be placed the paramount consideration shall be the welfare of the child** and subject to this the court shall have regard:

(a) to the wishes of the parents of the child; and

B (b) to the wishes of the child, where he or she is of an age to express an independent opinion.

(3) **There shall be a rebuttable presumption that it is for the good of a child below the age of seven years to be with his or her mother** but in deciding whether that presumption applies to the facts of any particular case, the court shall have regard to the undesirability of C disturbing the life of a child by changes of custody.

(4) ...

(emphasis added)

(a) Custody, Care And Control Of The Child

D **[14]** At the time of the hearing of the plaintiff's application, the child was one year old. The plaintiff has been his primary caregiver since his birth.

[15] The Federal Court in *Teh Eng Kim v. Yew Peng Siong* [1977] 1 LNS 138; [1977] 1 MLJ 234 upheld the decision of the High Court that custody E of the child should be given to the wife with access to the father. In that case, the youngest child was five years old. Raja Azlan Shah FJ (as HRH then was) agreed that particularly for a child of tender age, his custody and care should be with the mother, where he said the following:

> The youngest child, Bernard, is of tender years. In my opinion, his place F right now is with the mother. "No thing, and no person," said Sir John Romilly MR, in the case of *Austin v. Austin* [1865] 35 Beav 259 263 "and no combination of them, can, in my opinion, with regard to a child of tender years, supply the place of a mother, and the welfare of the child is so intimately connected with its being under the care of the mother, that no extent of kindness on the part of any other person can supply that G place ...

[16] The High Court in *Gan Koo Kea v. Gan Shiow Lih* [2003] 4 CLJ 539; [2003] 4 MLJ 770; [2003] 6 AMR 459 recognised that children needed continuity of care. Low Hop Bing J held that:

> H As the children before me are both below seven years of age, the rebuttable presumption under s. 88(3) is hereby invoked to the effect that it is good for them to be with their mother, who has always been with the children since the separation of the parties herein, and under s. 88(3), it is undesirable to disturb the life of the children by changes of custody.

[17] The defendant husband in this case has asked for joint custody, care I and control of the child. It is settled law that in order to rebut the statutory presumption in s. 88(3) of the LRA, the father must show that the mother

is an unfit mother (see *Karupayee Paramasua v. Ravisanthiran P Marimuthu* [2011] 1 LNS 650; *Lee Soh Choo v. Tan Ket Huat Tan Siew* [1986] 2 CLJ 143; [1986] CLJ (Rep) 440; [1987] 1 MLJ 255 and *Tan Siew Kee v. Chua Ah Boey* [1987] 1 LNS 77; [1988] 3 MLJ 20).

[18] In *Teoh Hock Soon v. Chan Peng Yee* [2012] 2 CLJ 960; [2012] 2 AMR 551; [2012] MLJU 71, the High Court granted joint custody of the children to both parents because based on the circumstances of the case, the court found that the defendant was an unfit mother. The defendant husband in this instant case has not claimed that the plaintiff wife is an unfit mother nor has he provided any evidence to show that she is an unfit mother.

[19] For these reasons, this court hereby allows the plaintiff wife's application and grants sole custody, care and control of the child, O, to her.

(b) Guardianship Of The Child

[20] As for the guardianship of the child, the plaintiff wife prays that she be given sole guardianship of the child on the basis that the defendant has shown by his conduct and attitude that he does not prioritise the welfare of the child.

[21] The defendant denies the plaintiff's claim that he does not prioritise the welfare of the child. He says that he was present during the birth of the baby. He does not deny that he went to Australia shortly after the child was born but he says that it was for an annual golf tournament which if he had cancelled his participation would cause him to lose a lot of money.

[22] In deciding on the issue of the child's guardianship, although this court considers the wishes of the child's parents but its primary consideration is the welfare of child. Section 11 of the GIA states that:

> 11. Matters to be considered
>
> The Court or a Judge, in exercising the powers conferred by this Act, shall have regard primarily to the welfare of the infant and shall, where the infant has a parent or parents, consider the wishes of such parent or both of them, as the case may be.

[23] Pursuant to s. 5 of the GIA, both parents of the child have equal rights and authority as to the upbringing of the child. Section 3 of the GIA states that the guardian of an infant shall be responsible for his support, health and education. Section 3 of the GIA provides as follows:

> The guardian of the person of an infant shall have the custody of the infant, and shall be responsible for his support, health and education.

[24] Another point made by the plaintiff wife as to why she should be given sole guardianship of the child is because if the defendant husband was allowed joint guardianship of the child, it would raise disputes as to the

A educational choices of the child. The wife submits that there is an overlap of the duties of a guardian under s. 3 of the GIA and s. 89(1) of the LRA. Section 89(1) of the LRA states as follows:

> (1) An order for custody may be made subject to such conditions as the court may think fit to impose, and subject to such conditions, if any, as
B may from time to time apply, shall entitle the person given custody to decide all questions relating to the upbringing and education of the child.

[25] The wife contends that because of the overlap between s. 3 of the GIA and s. 89(1) of the LRA and the disagreement between them as to the educational choices for the child, she should be granted sole guardianship as
C well as sole custody, care and control of the child.

[26] Having regard to the welfare of the child and the wishes of each of his parent, I find that it is not in the welfare of the child for the plaintiff wife to be the sole guardian of the child. To my mind, it would not be in the child's best interest for the defendant, who his father, to be cut-off from the
D responsibility of supporting the child and for providing for his health and education. It is not uncommon for husbands and wives, even those happily married, to have differing views as to their child's upbringing and education. It does not mean that just because a child's parents have differing views, one parent should be cut-off from the decision-making process relating to the
E health and education of the child. In my view, to exclude one parent from such decision-making process would not be in the best interest and welfare of a child; particularly in this case, where the child, O, is only a one year old infant.

F **[27]** For these reasons, it is my considered opinion that it will be in the best interest and welfare of the child, O, that both his parents are his guardians and are accordingly statutorily responsible for his support, health and education.

[28] Accordingly, both the plaintiff and the defendant are granted joint
G guardianship of the child, O.

(c) Defendant Husband's Access To The Child

[29] For the reasons discussed above, this court has decided to make (i) an order of guardianship awarding joint guardianship of the child to both the plaintiff wife and the defendant husband; and (ii) an order of custody
H awarding sole custody, care and control of the child to the plaintiff wife.

[30] This court is empowered by s. 89 of the LRA to make the order for custody subject to such conditions as it may think fit to impose. Such conditions include the right of access to the child by the parent deprived of
I custody "at such times and with such frequency as the court may consider reasonable".

[31] The defendant prays for free and reasonable access of the child including overnight access and additional access on the following occasions:

(i) the child's birthday for four hours from 11am to 3pm or from 7pm to 10pm;

(ii) on the defendant's birthday on 14 July from 11am to 5pm;

(iii) on Chinese New Year ("CNY") every alternate year, where for the year that the plaintiff is celebrating CNY with the child, the defendant to be given access to the child from 11am on the second day of CNY to 5pm to the third day of CNY.

[32] The child at the time of the hearing of this application was one year of age. The plaintiff has been the child's primary caregiver since his birth. Since her return to work, the plaintiff's mother has assisted her to look after the child with the assistance of a maid. It is clear from the averments in both parties' affidavits that the defendant has had minimal or no experience in caring for the child or being alone with the child. The child being such a young infant needs consistency in his life – consistency in the persons he is with and consistency in his schedule. It would not be in the child's best interest for the defendant to have free unscheduled unsupervised access to the child. The weekly day and time of such access by the defendant must be consistent and the access must be supervised by someone who is a consistent presence in the child's life. During the child's infancy, I also find that it would not be his best interest and welfare for the defendant to have overnight access to the child. This is because apart from consistency in his schedule and the persons caring for him, the child must also have consistency in his surroundings and environment.

[33] Having taken into account the child's best interest and welfare, the plaintiff's and the defendant's wishes, and the facts and circumstances of this case, this court hereby grants the defendant husband right of access to the child on the following days and time:

(i) on the first and third Saturdays of every month from 2pm to 6pm at a public place agreed between parties supervised by the plaintiff wife or her nominee;

(ii) on two weekdays per month to be agreed by the parties to be supervised by the plaintiff wife or her nominee;

(iii) on the child's birthday for four hours to be agreed between parties subject to the same terms of supervision;

(iv) on the defendant's birthday on 14 July of every year for four hours to be agreed between the parties subject to the same terms of supervision; and

(v) on CNY for alternate years starting from the year 2020 for the eve of CNY and first day of CNY to be exercised in Kuala Lumpur from 12pm to 8pm on both days.

[34] Once the child is older, the defendant may apply to the High Court under s. 96 of the LRA to vary the order for the custody and/or the accompanying terms of access. He may, for example, apply for the access to be unsupervised on the basis that the child is older. The High Court is empowered under s. 96 to vary any order for custody and maintenance based on the provisions in s. 96 of the LRA, which are as follows:

> **96. Power of Court to vary orders for custody and maintenance**
>
> The court may at any time and from time to time vary, or may rescind, any order for the custody or maintenance of a child on the application of any interested person, where it is satisfied that the order was based on any misrepresentation or mistake of fact or where there has been any material change in the circumstances.

(ii) Maintenance Of The Wife And Child

[35] Section 92 of the LRA imposes a statutory duty on parents to maintain or contribute to the maintenance of his/her children "either by providing them with such accommodation, clothing, food and education as may be reasonable having regards to his or her means and station in life or by paying for the cost thereof". Section 92 of the LRA states as follows:

> 92. Duty to maintain children
>
> Except where an agreement or order of court otherwise provides, it shall be the duty of a parent to maintain or contribute to the maintenance of his or her children, whether they are in his or her custody or the custody of any other person, either by providing them with such accommodation, clothing, food and education as may be reasonable having regard to his or her means and station in life or by paying the cost thereof.

[36] Pursuant to s. 77 and s. 93 of the LRA, this court has the power to order a man to pay maintenance to his wife and maintenance for his child during the course of matrimonial proceedings.

[37] As for the assessment of the maintenance payable, s. 78 of the LRA states that in determining the amount of maintenance to be paid by a man to his wife, the court shall base its assessment "primarily on the means and needs of the parties, regardless of the proportion such maintenance bears to the income of the husband or wife as the case may be".

[38] It is the plaintiff wife's case that their lifestyle includes frequent travel overseas, dining out at expensive restaurants, wearing designer clothes, purchase of designer items for themselves and for the child. The wife has exhibited photographs of this lifestyle and station of life, including photographs of them having meals out, staying at expensive hotels and

wearing branded designer clothes and apparels. She says that the defendant has a luxurious lifestyle of a jet-setter: he travels frequently; he wears designer clothes and uses branded high-end golfing equipment – paid for through his family business. The defendant husband does not deny the lifestyle but challenges the wife to prove the lifestyle.

[39] She shows in exh. "CC-3" of her affidavit screenshots from the defendant's Facebook account of his trip to Korea in September 2017. The photos that the defendant stayed at the Intercontinental Hotel and at the SIGNIEL Hotel in Seoul, Korea during that trip. She also exhibited screenshots of his Facebook page as evidence of his trip to Melbourne in October 2017, shortly after the child was born, for golf and holiday. The photos shown in exh. "CC-5" shows the defendant at Crown Tower, Melbourne and eating dinner at a Greek restaurant; having coffee at Baba Budan and drinking whisky at Whisky & Alement; and eating steak at Rock Pool Bar & Grill, Melbourne Crown Casino.

[40] The plaintiff wife has set out the expenses she is claiming as maintenance for her and the child and she has provided receipts and credit card statements in exhs. "CC-12", "CC-29", "CC-31" annexed to her affidavit as evidence of the expenses. She says that she plans to send the child to a Montessori school when he reaches the age of one year. Both the Montessori schools she has looked at, Trinity Kids at Summer Suites KL City Centre and Primrose Hill at Avenue K charges the sum of RM2,500 per month for playschool and childcare.

[41] Learned counsel for the plaintiff, Ms Kiran Dhaliwal, submits that the defendant only made bare denials without discharging his burden of proof that the plaintiff's statements and her evidence are not true. Ms Dhaliwal submits that the defendant could have shown his credit card statement to disprove the plaintiff's claim that he did not spend in the manner alleged by her. However, he did not exhibit any of his credit card statements. Additionally, the defendant says that the receipts exhibited by the plaintiff are unreasonable. However, he does not provide any evidence to the contrary as to what is reasonable.

[42] Further, the plaintiff avers that the defendant's family business includes running various Da Ma Cai lottery and jackpot outlets and that he holds directorships and is involved in various family owned companies including, *inter alia*, Filvest Sdn Bhd, Perkhidmatan Penaga Sdn Bhd and Perkhidmatan Nusa Sdn Bhd. She says that he enjoys a decadent and self-indulgent lifestyle paid through the family business. She exhibits screenshots from the defendant's Facebook page showing the defendant living a luxurious, jet-setter lifestyle.

[43] The plaintiff also contends that the defendant's father regularly writes the defendant cheques and gives the defendant free use of his own supplementary credit card, which is used for his own expenses and the

parties' expenses. She says for example he had used the supplementary credit card to pay for the hospital bill when the child was born and shows in exh. "CC-27" copies of the hospital bills and that the bills were paid by the defendant's supplementary credit card.

[44] The defendant lives in Damansara Villa condominium located in Damansara Heights. The plaintiff wife lived with him in the condominium before the separation. She avers that utilities and expenses of the condominium are paid by the defendant's family company, including the condominium's sinking fund, maintenance cost, electricity and water bills, Coway water bill, internet bill, Astro bill, phone bill and other bills. She exhibited in exh. "CC-32" of her affidavit a screenshot of the plaintiff's WhatsApp conversation where the plaintiff had sent an electricity bill to the defendant's family company's store manager to pay.

[45] The defendant admits that he holds directorships in Filvest Sdn Bhd, Perkhidmatan Penaga Sdn Bhd and Perkhidmatan Nusa Sdn Bhd. He says that these companies are his family's companies where the members of the board of directors are made up of members of his family, namely his parents and his two elder sisters. He annexed in exh. D of his affidavit the Form 49 of all these three companies, which lists out the names of the directors and company secretary of these companies. He says that he receives a salary totalling RM6,110 from Filvest Sdn Bhd and Perkhidmatan Penaga Sdn Bhd and exhibits his salary slips for both companies and his tax returns for the year of assessment 2017 evidencing the same.

[46] The defendant's case is that he makes a net salary of RM6,110 per month and that he is helping the costs for his mother's kidney treatments. He also says that he is obliged to go back to Teluk Intan frequently to visit both his father and mother who he says are both ill and that he has to bring his mother to hospital in Kuala Lumpur. He claims that based on his net salary and after deducting his parent's medical costs and his travel cost to and from Kuala Lumpur and Teluk Intan, he is unable to afford the amount claimed by the plaintiff in this application.

[47] The defendant does not provide any evidence to support his claim that he is bearing the costs of his mother's medical treatments. He also does not provide any evidence as to the frequency of his travels to and from Teluk Intan or the costs that he incurs per month for these travels.

[48] The defendant admits the trip to Korea in September 2017. He says that it is for a Perak Turf Club meeting and the trip was paid by the Perak Turf Club. Although he stated that he will later provide the evidence to court that the trip to Korea for a meeting of the Perak Turf Club and that it was paid by the club, none was provided on or before the hearing of this application. He also admits the trip to Australia for an annual golf tournament but he claims that he would lose a lot of money if he were to

cancel his participation in the tournament. The plaintiff in her affidavit-in-reply reiterated that the defendant joined the Crown Casino annual golf tournament for one day only ie, 6 October 2017 and the rest of the trip was spent with his friends, drinking and gambling at the casino.

[49] The defendant denies the rest of the plaintiff's averments in her affidavit as regards his lifestyle, which she claims is funded by his family business and through his father's supplementary credit cards to him. However, he does not provide any evidence to disprove her contentions.

[50] The defendant accepts that he has a duty under the LRA to maintain the child of the marriage. However, he contends that based on the net monthly salary of RM6,110 that he claims to receive from the family companies of which he is a director, he is unable to afford the amount prayed for by the plaintiff as child and spousal maintenance. In his affidavit-in-reply, the defendant agrees to pay RM1,500 per month as maintenance for the child and states that the plaintiff must also be responsible to bear the sum of RM1,500 as maintenance for the child since she is also working. He does not agree to pay any spousal maintenance to the plaintiff because she is working and has her own income.

[51] The defendant admits that he is involved in the family business of the Da Ma Chai lottery and jackpot outlets: in para. 4.48 of his written submissions the defendant states that he manages the family business of the Da Ma Cai outlets and most of his time is spent going out to work if necessary. He denies the plaintiff's averments and puts her to strict proof that his means are not just the salary of RM6,110 per month he receives from his directorships of the family companies but that his lifestyle is funded by the family companies and his father's supplementary credit cards. However, he does not provide any evidence to substantiate his denial. He only provided the family companies' Form 49 to show that he, his parents and sisters are directors of the companies. However, he does not provide any information as to whether he is also a shareholder of the companies and whether he receives any other form of remuneration from the companies and any annual dividends. He does not provide the companies' audited accounts to show the total amount of remuneration he receives from the companies in order to disprove the plaintiff's averment that he receives from the companies not only a monthly salary but also allowances and payments of expenses.

[52] Additionally, he does not provide any evidence to show that he pays the outgoings, charges, utility bills for the condominium as well as his internet and phone bills from his monthly salary instead of the family companies having paid the bills as averred by the plaintiff. He also does not provide any evidence to support his denial of the plaintiff's contention that he had paid for the hospital bills for the child's delivery with his father's supplementary credit card. All his denials of the plaintiff's claims as regards his lifestyle and expenses are bare denials unsupported by any evidence.

[53] The Court of Appeal in *Puncak Niaga (M) Sdn Bhd v. NZ Wheels Sdn Bhd* [2011] 9 CLJ 833; [2012] 1 MLJ 27; [2012] 1 AMR 1; held that "mere bare denials or assertions do not constitute evidence". Although the *Puncak Niaga* case (*supra*) relates to an application for summary judgment under O. 14 of the Rules of the High Court 1980, it is of general application to proceedings that are dealt with by affidavit evidence.

[54] The Privy Council in *Eng Mee Yong & Ors v. Letchumanan* [1979] 1 LNS 18; [1979] 2 MLJ 212 at p. 217 held that conflict in affidavits does not arise by mere denials. The Privy Council held that a challenge requires *prima facie* plausibility to raise a dispute. Lord Diplock said as follows in *Eng Mee Yong* (*supra*):

> Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be. In making such order on the application as he "may think just" the judge is vested with a discretion which he must exercise judicially. It is for him to determine in the first instance whether statements contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient *prima facie* plausibility to merit further investigation as to their truth.

[55] The Supreme Court in its decision of *Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 at p. 19 affirmed that the principle in *Eng Mee Yong* was "relevant and applicable in all cases where a judge has to decide a case or matter on affidavit evidence".

[56] The Privy Council in *Eng Mee Yong* is unequivocal that a judge in considering affidavit evidence must do so critically. It held that a judge is not "bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be".

[57] The defendant husband is under an obligation under the LRA and the Divorce and Matrimonial Proceedings Rules 1980 in an application by the plaintiff wife for an order of maintenance pending suit, to disclose all his means ie, all his sources of income. However, as can be seen in this case, he only disclosed the salary that he receives as director of both the family companies as his means. In the case of *Ng Say Chuan v. Lim Szu Ling* [2010] 10 CLJ 371; [2010] 4 MLJ 796; [2010] AMEJ 0225 the court took cognisance of the father's luxurious lifestyle to infer that he had other sources of income. Yeoh Wee Siam JC held that:

> [16] It is trite law that the husband has the primary responsibility, whereas the wife has a secondary responsibility, to maintain the children (see also s. 93(1) and (2) of the Act).

[58] On the issue of his means, Her Ladyship held that:

> [24] ... From the husband's expenditure, it is clear that he is living quite luxuriously, more so when he does not deny that he has two cars. He admitted that he even had a driver. It is morally and legally wrong for a father not to maintain his three children, ages ten, eight and six, when he is using his income, savings and resources to take care of himself solely, without any regard to his paternal and statutory duty to maintain his children. He does not appear to have made any efforts to cut down on his expenses or lifestyle or to tighten his belt.

[59] In this instant case, I find it inherently improbable that the defendant husband who claims to live only on a net monthly salary of RM6,110 per month can afford, just from that salary, to pay for the mortgage or rental, of a condominium in Damansara Heights as well as the monthly maintenance charges, sinking fund charges, electricity, water and internet bills for the condominium; pay for both his father and mother's medical treatments; pay the sum of RM12,000 for the child's delivery charges at a private hospital; travel to Seoul, Korea and Melbourne, Australia within the space of a month, where he stayed at high-end hotels; and as the photos in his Facebook show, eat steak and drink Scotch whisky at restaurants and bars; wear suits from Lord's tailor, shirts from Ralph Lauren and Hugo Boss, designer glasses, high-end sportswear and shoes; golf at the Mines Resort Golf and Country Club and the TPC in Kuala Lumpur; attend the Mumbai Racing Season in India; holiday with the plaintiff in Japan and stay at the Ritz-Carlton Hotel in Tokyo; stay at the Marriot Hotel in Nagoya, Japan; and regularly eat out including Omakase dinners at Japanese restaurants.

[60] Based on the defendant's lifestyle and the fact that he is the only son of a family, whose business is the Da Ma Cai lottery and jackpot outlets in Perak, which business the defendant says he manages, I find that his claim that his only means is the net salary of RM6,110 per month that he receives from two of the family companies to be inherently improbable. As held by Lord Diplock in *Eng Mee Yong* (*supra*), it is for the judge to determine in the first instance "whether statements contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient *prima facie* plausibility to merit further investigation as to their truth". For these reasons, I find that the defendant's bare denials of the plaintiff's averments as regards his lifestyle and means, and the evidence she had presented to support these averments, do not give rise to a conflict of evidence on the affidavits.

[61] In this instant case, I find that the plaintiff has discharged her burden of proving on a balance of probabilities of the defendant's lifestyle and means. The proof provided are copies of receipts and screenshots of

photographs on the defendant's own Facebook account. Not once does the defendant claim that these exhibits are of fraudulent documents or doctored photographs. The defendant only made bare denials. For the reasons discussed above, I find that the defendant's bare denials, which he relies on as raising a conflict of evidence as to his lifestyle and means, lack sufficient *prima facie* plausibility.

[62] Learned counsel for the plaintiff submits that the word "means" in s. 78 of the LRA and the phrase "means and station in life" in s. 92 of the LRA refers not only to a person's salary but also other means, including other sources of funds, that are used to maintain his/her station in life.

[63] The Court of Appeal in *Koay Cheng Eng v. Linda Herawati Santoso*; [2008] 4 CLJ 105; [2008] 4 MLJ 863; [2008] 4 AMR 159, held that the wife was to be placed in a position to enjoy the same standard of living as she had during the existence of the marriage. In *Sivajothi K Suppiah v. Kunathasan Chelliah* [2000] 3 CLJ 175; [2000] 2 AMR 2072; [2000] 6 MLJ 48, Faiza Tamby Chik J held that "the word "maintenance" is a term of very wide scope. It signifies any form of material provision that will enable an adult to live a normal life and a child to be brought properly". His Lordship referred to the English case of *Re Borthwick (Deceased); Borthwick and Another v. Beauvais and Others* [1949] 1 Ch 395 and quoted the following passage in p. 41 of Harman J's judgment in that case:

> It is said that maintenance is the only thing you can look at. What does that mean? It does not mean that you can only give the dependant just enough to put a little jam on his bread and butter. It has been already held that what is reasonable for one may not be reasonable for another. It must depend on the circumstances of the case. It certainly depends to some extent on the circumstances of the widow, but I think it may also depend on the circumstances of the testator, that is to say, whether he died a rich man or no, because a rich man may be supposed to have made better provision for his wife's maintenance than a poor one. Maintenance does not only mean the food she puts in her mouth it means the clothes on her back, the house in which she lives, and the money which she has to have in her pocket, all of which vary according to the means of the man who leaves a wife behind him. I think that must be so. **Maintenance cannot mean only mere subsistence**.
>
> (emphasis added)

[64] The amount that the plaintiff wife is claiming as maintenance for the child and for herself in column 2 of table 1 and table 2 respectively, based on the receipts for the expenses exhibited in her affidavit. After considering the means and needs of the parties, the amount this court allows for the child's monthly maintenance is in column 3 of table 1 and the wife's maintenance is in column 2 of table 2 below:

TABLE 1: CHILD MAINTENANCE

ITEM	CHILD'S EXPENSES (RM)	AMOUNT ALLOWED BY COURT (RM)
Accommodation cost (1/2 of RM3,000)	1,500.00	1,500.00
Utilities, Water, Electricity & Phone (1/2 of RM300)	150.00	100.00
Security (1/2 of RM226)	113.00	0.00
Food & groceries	1,200.00	600.00
Diapers (RM60 per pack. 3 packs per month)	180.00	180.00
Toiletries, creams & oils	150.00	150.00
Baby wipes, sanitizing liquids,	100.00	100.00
Feeding accessories & baby furniture on average	700.00	200.00
Vitamins & supplements	150.00	50.00
Clothes & shoes	300.00	200.00
Baby books & educational toys	300.00	200.00
Playgym Sessions (1/3 of RM1,650 for Gymboree Play & Music)	550.00	550.00
Water safety & swimming	380.00	0.00
Entertainment & outings	200.00	0.00
Main Salary (1/2 of RM1,100)	550.00	550.00
Main Agency Fees (1/2 of RM18,900/24	394.00	394.00
Maid's Expenses (Food and Toiletries ½ of RM300)	150.00	150.00

Medical expenses including vaccinations	300.00	100.00
Holiday expenses (1/2 of RM24,300/12)	1,013.00	500.00
CNY & Christmas Expenses (1/2 of RM2,000/12)	83.00	
Miscellaneous	200.00	0.00
Total	**8,663.00**	**5,324.00** (rounded down to 5,300.00)

TABLE 2: WIFE MAINTENANCE

ITEM	WIFE'S EXPENSES (RM)	AMOUNT ALLOWED BY COURT (RM)
Accommodation cost (1/2 of RM3,000)	1,500.00	1,000.00
Utilities, Water, Electricity & Phone (1/2 of RM300)	150.00	100.00
Security (1/2 of RM226)	113.00	0.00
Food & groceries	800.00	400.00
Clothing, accessories, shoes	300.00	0.00
Toiletries & cosmetics	150.00	
Professional exam papers & fees	750.00	0.00
Books & stationary	150.00	
Eating out	1,800.00	
Main Salary (1/2 of RM1,100)	550.00	500.00
Main Agency Fees (1/2 of RM18,900/24	394.00	
Maid's Expenses (Food and Toiletries ½ of RM300)	150.00	

Insurance: Car insurance (1/2 of 612.90) and Medical insurance (1,700/12)	193.00	
Gym	300.00	
Personal grooming (including hair salon)	300.00	0.00
Season parking (RM230), Petrol (RM300) and Toll (RM200) and Car Maintenance	830.00	0.00
Electronics and Digital purchases (e.g. phone, tablet, computer, laptop on average RM4,000 per annum)	333.00	0.00
Holiday expenses (1/2 of RM24,300/12)	1,013.00	00.00
CNY & Christmas Expenses (1/2 of RM2,000/12)	83.00	
Miscellaneous	200.00	0.00
Total	**10,159.00**	**2,000.00**

[65] In computing the interim maintenance payable for the child and payable for the plaintiff wife, I had taken into account the means of the defendant husband, the lifestyle and station of life of the parties during the marriage, a father's primary obligation under law to maintain his child, the fact that the wife is working and holding a management position in a bank, the needs of the child and the wife. I also took into consideration that the short duration of the marriage prior to their separation.

[66] For these reasons, I allowed the sum of RM5,300 out of the RM8,700 claimed by the plaintiff as child maintenance. I had allowed the sum of RM1,500 for the child's accommodation bearing in mind that the defendant husband has the primary responsibility to provide a roof over his child's head. With regards to the child's utility expenses, I had allowed RM100, which is 1/3 of the sum of expended monthly for the plaintiff and the child.

[67] As discussed above, the defendant is under a statutory duty pursuant to s. 92 of the LRA not only to provide accommodation, clothing and food for the child, but he also has to provide for the child's education. I find that

A it is reasonable taking into account the defendant's means and the parties' lifestyle and station in life that the child attends a private or international school. Accordingly, the defendant husband is ordered to pay for the child's education expenses on school fees at a private or international school commencing from 1 January 2020. The defendant is also ordered to continue
B to pay for the existing insurance policies that have been procured for the child until maturity.

[68] The wife's expenses based on her receipts as shown in table 2 above is RM10,159 per month. She has claimed maintenance from the defendant in the sum of RM4,500 per month. Although the plaintiff wife had exhibited
C receipts to substantiate her monthly expenses, I have allowed less than half of what she had prayed for after taking into account her actual needs, as oppose to her wants, and the short duration of the marriage. I allowed the sum of RM1,000 for the accommodation cost and RM100 for the utilities cost, which makes up 1/3 of the monthly expenditure for her and the child.
D I had disallowed all of the wife's claim for clothing, accessories, shoes, insurance, gym fees, personal grooming, professional exam fees, eating out, holidays, car expenses and electronic purchases.

[69] The sum awarded as interim maintenance for both the child and wife during the pendency of this matrimonial proceedings is based on the affidavit
E evidence and submissions of both parties. The wife is at liberty during the trial of the divorce petition to adduce witness evidence to show that the amount accorded to her as interim maintenance for her and the child pursuant to this application is insufficient to meet their monthly needs. She is also at liberty to apply from time to time to vary the order for maintenance
F if she can prove that that this order was made based on misrepresentation or a mistake of fact, or where there has been a material change in circumstance.

[70] The defendant husband has not paid any maintenance for the plaintiff wife and the child in the interim pending the order of this court and he refused to pay for the child's medical bills despite the plaintiff asking him
G to do so.

[71] The defendant husband is hereby ordered to pay the arrears in child maintenance from 1 April 2018 on or before 31 October 2019. He is to pay interest on the rate of 5% per annum for any arrears on the child maintenance from 1 November 2019 until full realisation.

H

(iii) Restraining Order Against The Husband

[72] The plaintiff wife has prayed for a restraining order against the defendant husband because of the domestic violence that she says he had inflicted on her. She avers he was quick to resort to violence whenever he
I did not get his way – these verbal and physical abuses inflicted on the plaintiff by the defendant were the cause of the breakdown of their marriage.

According to the plaintiff, it was his "explosion of violence" on the night of 25 October 2017 that continued to the early morning of 26 October 2017 was the reason why her parents came to pick her and the child up from defendant's parents' house in Teluk Intan to take them back to their house in Seremban.

[73] The defendant contends that the plaintiff has failed to provide any evidence and/or proof to show that the defendant is a violent person. He says that she has failed to provide police reports, medical reports or even photos to proof that he had physically abused her. He says that the allegation of domestic violence against him is without basis and is designed to tarnish his personality and to obtain this court's sympathy so that it will grant the plaintiff the orders she prayed for.

[74] While the plaintiff has not provided any documentary evidence that the defendant has verbally and physically abused her, she has provided evidence in her affidavit of the defendant's propensity for violence during the marriage, where she averred that the arguments occurred with regularity every few months and during such arguments the defendant would swear at her, calling her a "bitch" and would be abusive including push her head to the ground, hit her head, slap her face, spit on her, throw her belongings to the floor until they broke and break her phone when she wanted to call for help. She says that even when she tried to leave the scene to allow him to cool down, the defendant would not let her leave – he would block the door, sit on her and throw insults at her while physically hurting her, despite her pleas for him to stop. On one occasion when they fought in the car and she wanted to run away, he dragged her into the house from the carpark. She averred "that there were occasions during his violent outbursts that I wished I could die. The defendant left me with bruises. However, because I loved him and hoped that he would not repeat his behaviour, I would simply hide my bruises, accept his apology and make up with him after".

[75] Learned counsel for the defendant, Mr Albert Koo, submits the restraining order prayed for by the plaintiff is not required at all, is frivolous and only troubles this court. He submits that the defendant reiterates that because of the age difference between the plaintiff and the defendant, whereby he is nine years older than her, and she was 25 years of age at the material time is the reason for the confusion of facts (kecelaruan fakta) by the plaintiff. It can be seen from the screenshot of their WhatsApp exchanges in exh. "CC-25", that the defendant condescendingly refers to the plaintiff as "little girl" or "girl" even though she is his wife and the mother of his child. The defendant also contends that the plaintiff's statements are clouded by her unstable emotions (emosi plaintiff yang kurang stabil).

[76] Ms Dhaliwal for the plaintiff submits that judicial notice can be taken that it is usual in cases of domestic violence that police reports are not always made. Counsel submits that the balance of convenience clearly lies in granting the injunction, as it is necessary for the protection of the plaintiff wife and the child.

[77] Under s. 103 of the LRA, this court can grant an injunction against molestation, among others, during the pendency of any matrimonial proceedings:

> **103. Injunctions against molestation**
>
> The court shall have power during the pendency of any matrimonial proceedings or on or after the grant of a decree or divorce, judicial separation or annulment, to order any person to refrain from forcing his or her society on his or her spouse or former spouse and from other acts of molestation.

[78] In *Sheng Lien v. Tan Teng Heng & Anor* [2010] 1 LNS 1480, the High Court had granted an injunction against molestation against the husband even though there was just "shouting" by the husband at the wife and no violence yet. There was also no police report to prove the shouting. Yeoh Wee Siam JC (as she then was) held that if the court was to wait until violence occurs before granting the injunction, it would be too late. She held as follows:

> From the evidence, it is clear that the relationship between the parties is very tense and uncomfortable, and the parties can no longer live together with each other under the same roof. Since it has been shown that the Respondent went "shouting" at the Petitioner at her workplace, and had been persistent in asking to be allowed to come home and even giving veiled threats, the court is of the opinion that an injunction should be granted against molestation by the Respondent to avert further tension and to restrain the husband from forcing his society on his spouse. **The court does not have to wait for the day when violence occurs before it grants such order; that would be too late**.
>
> (emphasis added)

[79] In this instant case, it is the plaintiff wife's evidence that there have been numerous occasions of violence inflicted on her by the defendant. As the evidence shows, it was this domestic violence that caused the wife to leave the matrimonial home and the luxurious and expensive lifestyle she shared with the defendant.

[80] Having considered the evidence before me, I find that on a balance of convenience, an injunction against molestation should be granted against the defendant husband during the pendency of this matrimonial proceedings. The plaintiff had also prayed for an injunction that the defendant does not assault, harass or molest her family and the child. However, there is no evidence that

the defendant had ever assaulted or was violent towards the plaintiff's family or the child. Therefore, I do not find that it is necessary that the injunction against molestation be extended to her family and the child.

[81] Accordingly, pursuant to s. 103 of the LRA, this court hereby orders that the defendant husband either by himself or by his agents, be restrained until further order from assaulting, harassing and/or threatening the plaintiff wife.

(iv) Plaintiffs Wife's Claim For The Defendant To Return To Her The Sum Of RM16,620

[82] The plaintiff claims the sum of RM16,620 from the defendant, which she says is the balance of *angpao* monies totalling RM34,620 received by her parents during the wedding reception in Ipoh in March 2016. Her parents gifted the money to her and had recorded in a book, the individual sums of money received during the reception. The plaintiff says that when she went to the condominium to pack on 14 November 2017, the defendant told her that there was only RM22,000 left of her *angpao* monies and that he will return the said sum. She says that the defendant has since claimed that he banked in RM20,000 only and that because she engaged a photographer costing RM2,000 to take newborn photos of the child, he only returned RM18,000 to her. She says that the defendant ought to repay her a further RM16,620 as the total amount she had handed him was RM34,620.

[83] The defendant denies that the plaintiff's averment that she had handed him *angpao* money totalling RM34,620. He contends that after calculating the *angpao* money, the plaintiff had handed him the sum of RM20,000, which he had kept in the safe. He says that he had returned all the moneys kept in the safe to the plaintiff – RM13,000 in RHB Bank in KLCC and RM5,000 in Seremban to the plaintiff. The defendant says that the plaintiff had borrowed a sum of RM3,000 to take professional photographs of the child and had returned to him the sum of RM1,000. He says that therefore, the sum which he should return to her is only RM18,000, which he has returned to her.

[84] The dispute between the parties as regards the *angpao* moneys is the amount of *angpao* monies the plaintiff had received from her parents and the amount that she had given to the defendant to keep in the safe in their house. The plaintiff avers that it is RM34,360 and exhibits in exh. "CC-25", the handwritten record of the angpoa monies received during the wedding reception. The defendant avers that the plaintiff had given him the sum of RM20,000 to keep in the safe and says in his affidavit that he does not know whether the sum is actually RM20,000. However, the screenshot of his WhatsApp conversation with the plaintiff shows that he told the plaintiff "U gave me 20k. That's all I have. U think before you comment anything ... My dad gave me 20k and I have 20k from you".

[85] The plaintiff's application in this originating summons is decided by this court by way of affidavit evidence and not by testimony of witnesses. There is a conflict as to how much money the plaintiff gave the defendant to keep in the safe – was it RM34,360 as she avers or was it RM20,000 as he avers?

[86] It is settled law that when dealing with conflicting affidavit evidence, the court can only consider evidence that is undisputed or uncontroverted. In the Privy Council case of *Tay Bok Choon v. Tahansan Sdn Bhd* [1987] 1 CLJ 441; [1987] CLJ (Rep) 24; [1987] 1 MLJ 433 Lord Templeman held:

> At the end of the day the judge must decide the petition on the evidence before him. If allegations are made in affidavits by the petitioner and those allegations are credibly denied by the respondent's affidavits, then in the absence of oral evidence or cross-examination, the judge must ignore the disputed allegations. The judge must then decide the fate of the petition by consideration of the undisputed facts.

[87] The principles laid out in *Tay Bok Choon* (*supra*) as regards affidavit evidence was applied by the Court of Appeal in *Diana Clarice Chan Chiing Hwa v. Tiong Chiong Hoo* [2002] 1 CLJ 721; [2002] 2 MLJ 97; [2002] 2 AMR 1527, where Siti Norma Yaakob JCA (as she then was) held:

> Allegations and counter allegations of other forms of improper behaviour made by one party against the other abound in the 13 affidavits filed in support or in opposition to the applications for custody. They are all aimed at showing either party to be the guilty party and therefore not the fit and proper parent to have the custody of the four children. *Needless to say the affidavit evidence alone, conflicting as they are, cannot form the basis of deciding the truth of the matters complained of in the absence of any cross examination of the makers of the affidavits.*
>
> (emphasis added)

[88] Faced with the conflicting affidavit evidence as to how much money was given by the plaintiff to the defendant to keep in the safe, this court is unable to decide on the truth as to the amount of money given to the defendant by the plaintiff for safe-keeping without cross-examination of the plaintiff and the defendant and the testimony of other witnesses, for eg, her parents as to the amount of moneys received during the wedding reception.

[89] Because of the conflicting affidavit evidence, this court is unable under this originating summons to decide on the plaintiff's prayer that the defendant return the sum of RM16,620 to her. The plaintiff can make her claim in the divorce petition or file a separate writ action for the return of the monies, where oral evidence from witnesses will be called and the court will be able to decide based on such oral evidence as to veracity of each party's claim as to amount that was given to the defendant to be kept in the safe.

Decision

[90] For the reasons above, this court hereby make the following orders:

(i) the plaintiff wife and defendant husband is granted joint guardianship of the child;

(ii) the plaintiff wife is granted sole custody, care and control of the child;

(iii) the defendant husband is to pay child maintenance in the sum of RM5,300 per month from 1 April 2018. The sum is payable in advance before the seventh day of each month directly into a bank account designated by the plaintiff;

(iv) the defendant husband is to pay the arrears of the child's maintenance on or before 31 October 2019;

(v) the defendant husband is to pay for the child's education expenses on school fees at a private or international school commencing from 1 January 2020;

(vi) the defendant is to continue to pay for the existing insurance policies taken out for the child until maturity;

(vii) the defendant husband is to pay the sum of RM2,000 as maintenance to the plaintiff wife. The maintenance is payable to the plaintiff wife from the month of August 2019 and is payable in advance by the seventh day of every calendar month directly into a bank account designated by the plaintiff wife;

(viii) the defendant husband is to pay interest at the rate of 5% per annum for:

(a) any arrears on the child maintenance as ordered in item 3 from 1 November 2019 until full realisation; and

(b) on all future order of maintenance from the eighth day of each calendar month on which the same falls due until full realisation;

(ix) the defendant husband either by himself or by his agents, be restrained until further order from assaulting, harassing and/or threatening the plaintiff wife;

(x) the defendant husband is accorded access to the child on the following terms:

(a) on the first and third Saturdays of every month from 2pm to 6pm at a public place agreed between parties supervised by the plaintiff wife or her nominee;

A

(b) on two weekdays per month to be agreed by the parties to be supervised by the plaintiff wife or her nominee;

(c) on the child's birthday for four hours to be agreed between parties subject to the same terms of supervision;

B

(d) on 14th July of every year for four hours to be agreed between parties subject to the same terms of supervision; and

(e) on CNY for alternate years starting from the year 2020 for the eve and first day of CNY to be exercised in Kuala Lumpur from 12pm to 8pm on both days;

C

(xi) the defendant husband is to pay the plaintiff wife costs of RM5,000 within 30 days of this order.

Orders

[91] So ordered accordingly.

D

E

F

G

H

I